

CAUSE NO. 08-34 (B) and (F)

NAME: Garvin Industrial Associates

ADMINISTRATIVE LAW JUDGE: William K. Teegarden

DATE: July 24, 2009

COMMISSION ACTION: Affirmed

FINDINGS OF FACT

1. The Indiana Department of Homeland Security is an Agency within the meaning of IC 4-21.5.
2. IC 4-21.5 and 675 IAC 12, apply to this proceeding.
3. The Commission is the ultimate authority within the meaning of IC 4-21.5 with respect to enforcement orders of the Agency.
4. The Agency is the State entity responsible for enforcing State Building and Fire Codes in Indiana.
5. At all times relevant to this proceeding, Garvin possessed a building in Evansville, Indiana.
6. In April of 2008, a duly authorized employee of the Agency issued the Order to Garvin.
7. The only portion of the Order which remains unresolved is violation #1 which relies on 675 IAC 12-4-9.
8. 675 IAC 12-4-9 requires a building to comply with the Building Codes under which it was constructed and asserts that the failure to properly maintain a sprinkler system violates that provision.
9. The parties agreed to proceed by summary judgment motions.
10. To prevail on summary judgment, the Agency must present undisputed facts which establish two propositions:
 - (a) The building, as originally constructed, was required to have a functioning sprinkler system and
 - (b) if there is not a functioning sprinkler system, that violation occurred subsequent to 1984. See P.L. 8-19:4 which effectively grandfather's violations occurring prior to the effective date.
11. The Agency filed its motion for summary judgment with its listing of undisputed facts.
12. Included in this statement are specific dates of construction, use of the building, construction type, dates of property transfers and the number of separate sprinkler systems in the building.
13. The attachment to the brief are copies of the relevant codes assuming the statement of facts is correct.
14. Garvin's response states there is insufficient evidence attached to the motion to establish many of the alleged undisputed facts and points out the fact that this matter is extremely fact sensitive.

15. Garvin asks that summary judgment be denied for failure of the Agency to provide affidavits or other competent evidence of the alleged undisputed facts. ¹
16. In its response brief, the Agency sought to shore up its statement of facts by references to information kept by Vanderburgh County Assessor's office.
17. This resulted in some significant revisions to the listing of "Undisputed Material Facts".
18. In its response to the Agency's reply, Garvin includes an e-mail from the Evansville FD indicating that there are several separate sprinkler systems added some time ago but not with the original construction.
19. The Commission has considered a similar case and decided that in the absence of affidavits, in matters where detailed information about use or dates of construction, etc, a hearing should be held. See Commission minutes of May, 2006, IN RE: MILLER POULTRY (05-47) in which the administrative law judge relied on a statement of facts rendered by a Professional Engineer acting within the scope of his expertise and was overturned by the Commission who ordered a hearing to be held.
20. The administrative law judge is uncomfortable making legally binding findings of fact in this matter without direct examination and cross examination on issues involving dates of construction and installation of sprinkler systems.
21. Somewhat reluctantly, the administrative law judge concludes a hearing is necessary.

NONFINAL ORDER

Summary judgment for the Agency is hereby denied. This matter is returned to the administrative law judge with instructions to hold a fact-finding hearing.

¹ Garvin also relies on TR 56 stating that the Agency did not properly designate the source of its factual basis. This reliance on the trial rules is misplaced since IC 4-21.5-3-23 has never been amended to mirror the Indiana Trial Rules.